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No. 95-1521

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MICHAEL JAY SINGER
ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

58pp

QUESTIONS PRESENTED

1. Whether a court may review the decision not to process an immigrant visa application in a particular foreign country based on consular venue considerations.

2. Whether the policy of the United States Government, in conformity with an international agreement governing migration in Southeast Asia, not to accept immigrant visa applications from migrants who have been determined under the agreement not to be refugees until they return to their country of origin violates 8 U.S.C. 1152(a)(1), which provides that no person shall be discriminated against in the issuance of an immigrant visa because of that person's nationality.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States Department of State, Bureau of Consular Affairs; Warren Christopher, Secretary of State; Mary A. Ryan, Assistant Secretary of State for Consular Affairs; and Donna Hamilton, Deputy Assistant Secretary of State for Consular Affairs. Petitioners were defendants in the district court and appellees in the court of appeals. All individual petitioners appear in their official capacities only. Richard Mueller, who was a defendant-appellee below in his official capacity as Consul, Consulate General of the United States, Hong Kong, has left that position; his replacement, Richard Boucher, will assume the duties of the office on or about August 18, 1996. Wayne Leininger, who was a defendant-appellee below in his official capacity as Chief of the Consular Section, Consulate General of the United States, Hong Kong, has left that position; his replacement, Robert Tynes, will assume the duties of the position on or about August 20, 1996. Matthew Victor, who was also a defendant-appellee below in his official capacity as Refugee Officer, Consulate General of the United States, Hong Kong, no longer holds that position, which has been abolished; the responsibilities of the position have been distributed among several other officials.

Respondents, who were plaintiffs-appellants below, are Legal Assistance for Vietnamese Asylum Seekers, Inc. (LAVAS), Thua Van Le, Em Van Vo, Thu Hoa Thi Dang, and Truc Hoa Thi Vo. Respondents have also moved in this Court to add Luu Van Hy, Ton Van Nguyen, Mandy Yung, and Dien Van Nguyen as respondents.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The order of the district court denying a temporary restraining order (Pet. App. 19a-21a) is unreported. The order of the court of appeals entering a preliminary injunction (Pet. App. 22a-23a) is unreported. The order of the district court granting summary judgment for the government (Pet. App. 24a-28a) is unreported. The opinion of the court of appeals that reversed the district court's grant of summary judgment to petitioners, declared the government's policy to be in violation of 8 U.S.C. 1152(a)(1), and remanded for further proceedings (Pet. App. 1a-18a) is reported at 45 F.3d 469.

A subsequent order of the court of appeals directing a limited remand on the issue of mootness (Pet. App. 29a-30a) is unreported. The opinion of the district court on remand, concluding that the case was moot (Pet. App. 31a-38a), is reported at 909 F. Supp. 1. The opinion of the court of appeals denying the government's petition for rehearing and reversing the district court's mootness ruling (Pet. App. 39a-49a) is reported at 74 F.3d 1308. The order of the court of appeals rejecting the government's suggestion of rehearing en banc (Pet. App. 50a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1995. Pet. App. 1a. A petition for rehearing was denied on February 2, 1996. Pet. App. 39a. The petition for a writ of certiorari was filed on March 21, 1996, and was granted on June 17, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 701(a) of Title 5, United States Code, provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

2. Section 1152(a)(1) of Title 8, United States Code (Section 202(a)(1) of the Immigration and Nationality Act) provides:

> Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

3. Section 1202(a) of Title 8, United States Code (Section 222(a) of the Immigration and Nationality Act) provides in part that "[e]very alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed."

STATEMENT

This case concerns the application of Section 202(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1152(a)(1), which, among other things, prohibits United States consular officials from discriminating on the basis of nationality "in the issuance of an immigrant visa." Respondents contend that that provision is contravened by a Department of State policy regarding the processing of immigrant visa applications of aliens who migrated illegally to Hong Kong, and who have been determined (pursuant to an international agreement to which the United States is a party) not to qualify for refugee status. Under the challenged policy, such immigrant visa applications must be filed in the aliens' home country and may not be processed by United States consular officials in Hong Kong; the policy does not, however, affect the substantive standards to be applied to such applications. The court of appeals nevertheless agreed with respondents that the policy violates Section 1152(a)(1). The court of appeals also rejected the government's threshold contention that consular visa determinations, including those concerning where visa applications are to be filed by aliens outside the United States, are not subject to judicial review.

1. During the 1980s, a combination of political and economic circumstances in Vietnam and the prospect of resettlement in another country, particularly the United

States, induced many Vietnamese nationals to migrate to other countries in Southeast Asia. The resources of the countries where those migrants first landed had already been strained by large migrations from Vietnam, Laos, and Cambodia; more than 750,000 persons from Vietnam alone have migrated to other countries in Southeast Asia. Because of the substantial migration, some countries began to turn back migrant "boat people," which often resulted in tragic loss of life at sea. In 1988, Hong Kong revoked its prior policy of according the boat people presumptive status as refugees and began to treat them as illegal aliens. See J.A. 69, 123.

To defuse the migration crisis, to protect those refugees who genuinely feared political persecution, to avoid further loss of life, and to deter further uncontrolled migration, 50 countries, including the United States, Vietnam, and Hong Kong, entered in 1989 into a multinational initiative, the Comprehensive Plan of Action (CPA).[1] The CPA established an internationally coordinated system, under the auspices of the United Nations High Commissioner for Refugees (UNHCR), to process claims of refugee status by Vietnamese and Laotian migrants. Under the CPA, Vietnamese and Laotian migrants were permitted to land in other countries (including Hong Kong) and were "screened" by those "first asylum" countries under international standards to determine

[1] The text of the CPA is reprinted at J.A. 31-41. Although the United States as a matter of foreign policy adhered to the terms of the CPA, it did not have formal status under United States law. The CPA (including its refugee screening procedures) formally ended on June 30, 1996, but because many screened-out Vietnamese migrants have remained in Hong Kong after that date, the policy concerns that led to its adoption remain live. See CPA Steering Committee Consensus Statement at 2 (Mar. 6, 1996) (lodged with the Clerk). The formal conclusion of the CPA does not affect the issues in this case.

whether they were refugees (*i.e.*, whether they had a well-founded fear of persecution).[2]

Those migrants who were found entitled to refugee status ("screened-in") were permitted to stay temporarily in the country of first asylum and, from there, to seek resettlement in a third country. J.A. 38-39, 124. On the other hand, a central tenet of the CPA was that each migrant found not to be eligible for refugee status should return to his or her country of origin. The agreement of the CPA's participants that "screened-out" migrants would be repatriated was essential in persuading reluctant countries to permit migrants to land and to establish their claims to refugee status, rather than turn them back to sea. See J.A. 124-127. The CPA provided that "every effort will be made to encourage the voluntary return" of screened-out migrants (J.A. 39), but it did not prohibit countries of first asylum such as Hong Kong from involuntarily repatriating them.[3]

[2] Pursuant to the CPA, the migrants were screened under criteria established by the UNHCR, based on the 1951 United Nations Convention Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6259, 6261-6264. In Hong Kong, the migrant asylum seekers were screened by Hong Kong authorities under UNHCR standards to determine whether they had a well-founded fear of persecution. If a migrant was found not to qualify as a refugee, he or she was permitted to appeal to the Refugee Status Review Board, an independent body established under the CPA. If the Board found that the migrant did not qualify as a refugee, the migrant could appeal further to the UNHCR. J.A. 105.

[3] As a matter of policy, the United States Government initially opposed forced repatriation to Vietnam, even of migrants who had been determined not to be refugees. The United States continues to have a strong preference for voluntary repatriation, but, at the February 1994 meeting of the Steering Committee of governments administering the CPA, the United States stated that it no longer objects in principle to the mandatory repatriation of those screened-out

Accordingly, under the CPA, a Vietnamese national screened out from refugee status in Hong Kong must return to Vietnam. Such a Vietnamese national may apply in Vietnam for immigration to the United States under the Orderly Departure Program (ODP), if he or she is the beneficiary of a visa petition filed by a United States sponsor (see p. 7, *infra*). The ODP is a major emigration program established in 1979 by the United States and Vietnamese governments, by which more than 360,000 Vietnamese nationals had been resettled in the United States directly from Vietnam as of March 15, 1994. J.A. 129-131. Migrants who voluntarily return from Hong Kong are usually placed at the head of the processing queue in Vietnam; the evidence below was that processing and approval of a visa application through the ODP after a migrant's return takes approximately three to six months; with other exit formalities, the total time from a migrant's return to Vietnam until his or her exit under the ODP is about six to twelve months. J.A. 131, 177. United States officials have concluded that Vietnamese officials do not persecute screened-out migrants who have returned from Hong Kong and do not impede their departure under the ODP. J.A. 131, 201, 204. The UNHCR also has found "no substantiated reports that any of the 60,000 returnees have suffered ill treatment on return." See J.A. 190 (CPA Steering Committee statement (Feb. 14, 1994)).

2. A number of Vietnamese nationals who migrated illegally to Hong Kong and failed to qualify for refugee status under the CPA screening process have sought to

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migrants who refuse to leave Hong Kong voluntarily. J.A. 127, 176, 196. That change in policy was based on improvements in conditions in Vietnam and in the Orderly Departure Program (ODP) facilitating controlled emigration directly to the United States from Vietnam. J.A. 177, 197.

apply in Hong Kong for immigrant visas permitting them to travel to the United States. Some of those migrants are eligible for immigration to the United States as the close relatives of United States citizens or aliens lawfully admitted for permanent residence in the United States; the individual Vietnamese respondents in this case are relatives of United States citizens. See 8 U.S.C. 1151(b) and 1153(a); J.A. 17, 223, 225.

Under the procedures for immigrant visas established under the INA, a United States citizen or permanent resident alien seeking to sponsor the immigration of a close relative may file a petition with the Attorney General, seeking to have his or her relative classified as an alien eligible for an immigration preference. See 8 U.S.C. 1154(a).[4] If the Attorney General (through the Immigration and Naturalization Service (INS)) determines that the sponsored alien is in fact entitled to the preference, she approves the petition and forwards it to the State Department. 8 U.S.C. 1154(b). A consular officer of the State Department then determines whether the alien is excludable from admission to the United States under the INA and is therefore ineligible to receive an immigrant visa. *Ibid.*; see 8 U.S.C. 1182(a).[5] As a general matter, no intending immigrant may be admitted to the United States without a valid immigrant visa issued by a consular officer. 8 U.S.C. 1181(a), 1182(a)(7).

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[4] An employer wishing to employ an alien within the United States may also file a petition with the Attorney General to have an alien accorded an employment-based immigration preference. See 8 U.S.C. 1154(a)(1)(D).

[5] The Attorney General may, in her discretion, waive certain of the bases for exclusion of an alien seeking to immigrate to the United States. 8 U.S.C. 1182(h). That determination is made by the Attorney General, acting through the INS, not State Department consular officials.

Prior to April 1993, the United States Consulate General in Hong Kong processed the immigrant visa applications of migrants before they were screened under the CPA, and sometimes even after they were screened out. J.A. 106-107. The processing of visa applications filed by screened-out migrants provoked objections from the UNHCR and other signatories to the CPA. They maintained that processing such applications for direct resettlement in the United States from countries of first asylum such as Hong Kong would undermine the CPA process, by deterring voluntary repatriation of screened-out migrants and inducing further migration. See J.A. 129. Taking into account those objections and the impact of such processing on voluntary repatriation, the State Department adopted a policy against processing any new immigrant visa applications of screened-out migrants until they return home.[6] The United States now concurs with other countries that the policy against accepting immigrant visa applications in Hong Kong is "fundamentally important to the success of the CPA," for unless it is made clear to screened-out Vietnamese migrants that they will not be resettled in the United States directly from Hong Kong and other first-asylum countries, those migrants will be unwilling to return voluntarily to Vietnam. See J.A. 128.[7]

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[6] The State Department initially adopted a policy against processing screened-out migrants' applications in April 1993. J.A. 109. On February 24, 1994, the Department suspended that policy temporarily. J.A. 206, 210. A firm policy against processing applications by screened-out migrants was resumed on December 1, 1994, prospectively only. J.A. 218-222.

[7] At the February 1995 meeting of the Steering Committee of governments administering the CPA (after the district court proceedings on the merits in this case were completed), the United States joined the UNHCR and other CPA participants in reaffirming their commitment to voluntary repatriation of screened-out migrants. The consensus statement adopted by the Steering Committee at that meeting included a commitment, accepted by the United States, not to consider screened-out Vietnamese migrants for resettlement until they return to Vietnam. See Charles Sykes Aff. ¶ 8 (June 15, 1995); Sykes Aff. ¶ 5 (Feb. 16, 1996) (both lodged with the Clerk of this Court at the petition stage). In February 1996, the British Foreign Secretary appealed to Secretary of State Warren Christopher for a "clear statement" by the CPA Steering Committee "that the remaining migrants should now go back to Vietnam." Sykes Aff. ¶¶ 8-9 (Feb. 16, 1996). On March 6, 1996, the United States joined another consensus statement of the CPA Steering Committee, again reaffirming that Vietnamese migrants found not to be refugees should return to Vietnam. See CPA Steering Committee Consensus Statement (Mar. 6, 1996) (lodged with the Clerk).

3. This action was brought in the United States District Court for the District of Columbia on February 25, 1994, to challenge the United States Government's policy against processing visa applications of screened-out migrants until they return home. The plaintiffs (respondents in this Court) are a non-profit legal-rights organization, Legal Assistance for Vietnamese Asylum Seekers, Inc. (LAVAS), two Vietnamese nationals who migrated illegally from Vietnam to Hong Kong (Ms. Thu Hoa Thi Dang and Ms. Truc Hoa Thi Vo), and the individual migrants' sponsors in the United States. Pursuant to the CPA, Ms. Dang and Ms. Vo had been screened by Hong Kong authorities under international standards, and had been found not to be refugees. They had then sought to apply for immigrant visas to travel to the United States. Each was informed by a consular officer at the United States Consulate General in Hong Kong that, because she had been found not to be a refugee, she could not apply for

an immigrant visa in Hong Kong but could apply only in her country of origin.[8]

The district court granted the government's motion for summary judgment. Pet. App. 24a-28a. The district court rejected respondents' primary contention that the government's policy concerning screened-out migrants violated a State Department regulation, which at the time provided that, "[u]nder ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides." 22 C.F.R.

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[8] Under an interim policy in effect from February to December 1994 (see p. 8, n. 6, *supra*), Ms. Dang and Ms. Vo were later permitted to apply for visas in Hong Kong. Both did apply; Ms. Dang subsequently received an immigrant visa and traveled to the United States. The case is therefore moot as to her and her sponsor. Pet. App. 42a. The United States Consulate General in Hong Kong denied Ms. Vo's visa application because (among other things) there was insufficient information to support a conclusion that she would not be a public charge in the United States. In such circumstances, the applicant may submit additional information in support of her application. 22 C.F.R. 40.101(b). Ms. Vo was permitted to submit such further information until November 16, 1996, and she has done so; her application is now pending before the Consulate General in Hong Kong.

Because of the possibility that a final decision on Ms. Vo's application could make this case moot as to her and her sponsor, respondents moved on June 25, 1996, to join additional parties as respondents in this Court and for class certification, to ensure the continuation of a live controversy. In our response filed on July 12, 1996, we informed the Court that we did not oppose the joinder as respondents of Mr. Luu Han Vy and Mr. Ton Van Nguyen, who are screened-out Vietnamese migrants currently in Hong Kong and the beneficiaries of current immigrant visa petitions, and Ms. Mandy Yung and Mr. Dien Van Nguyen, their respective United States sponsors. See J.A. 223-226. We did, however, oppose respondents' motion for class certification. As of the filing of this brief, the Court had not acted on respondents' motion.

42.61(a) (1993). The court accepted, as a policy choice entitled to deference, the State Department's determination that "the situation of the detained Vietnamese asylum-seekers in Hong Kong is not an 'ordinary circumstance.'" Pet. App. 27a (footnote omitted). Accordingly, it concluded that "the failure to process the immigrant visa applications of Vietnamese asylum-seekers denied refugee status in Hong Kong does not violate the INA and the regulations promulgated thereunder." *Id.* at 28a.

4. A divided panel of the District of Columbia Circuit reversed and remanded. Pet. App. 1a-18a. As an initial matter, the majority held that the migrant plaintiffs' sponsoring relatives in the United States had a right under the Administrative Procedure Act (APA), 5 U.S.C. 702, to bring an action to require that the migrants' visa applications be accepted in Hong Kong. The majority therefore declined to consider whether the migrant plaintiffs themselves or LAVAS had a right of judicial review. Pet. App. 5a-6a.

On the merits, although the majority rejected respondents' claims based upon the State Department regulation (Pet. App. 7a-8a),[9] it held (*id.* at 8a-12a) that the policy of not processing applications submitted by screened-out Vietnamese migrants in Hong Kong violates 8 U.S.C.

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[9] The regulation was amended effective September 6, 1994. 59 Fed. Reg. 39,955. It now provides that, "[u]nless otherwise directed by the [State] Department," an alien applying for an immigrant visa shall present the application at the consular office having jurisdiction over the alien's place of residence, or (if the alien has no residence) at the consular office where the alien is physically present. 22 C.F.R. 42.61(a). The court of appeals noted that the State Department has exercised its authority to "direct otherwise" with respect to the venue for processing visa applications by screened-out Vietnamese migrants in Hong Kong. Pet. App. 8a.

1152(a)(1). The court held that petitioners had violated that provision in drawing what it believed to be "an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants." Pet. App. 9a. The court declined to defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), to the State Department's contrary interpretation of Section 1152(a)(1), as it found that Section to be unambiguous on the point. Pet. App. 11a.[10]

Judge Randolph dissented. Pet. App. 13a-18a. He first noted that "[t]he potential repercussions of the majority's decision are, to say the least, disquieting. The flight of illegal aliens to Hong Kong and elsewhere has created an international crisis. Fifty nations have sought to avert the flood by stopping the flow. Not processing their visas in Hong Kong removes one of the reasons so many of these people are leaving their homeland and embarking on the dangerous journey across the South China Sea." *Id.* at 14a. Judge Randolph then concluded that "[t]he so-called 'discrimination' the majority detects stems from the illegal status of the screened out boat people, rather than from the fact (if it is a fact) that they are all Vietnamese nationals." *Id.* at 15a. He reasoned that the government's policy with respect to screened-out migrants in Hong Kong "is not discrimination on the basis of nationality, but discrimination on the basis of legality. And the statute does not forbid it." *Ibid.*

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[10] The majority erroneously stated that an INS interpretation of the INA is at issue here. Pet. App. 11a. In fact, the particular visa provisions at issue are administered by the Department of State and its consular officers, and it therefore is the Department's interpretation that is entitled to deference under *Chevron*, absent a controlling interpretation by the Attorney General. See 8 U.S.C. 1103.

The government then filed a petition for rehearing and suggestion of rehearing en banc. After a limited remand for proceedings on the issue of mootness, the panel concluded that the case was not moot and denied rehearing. Pet. App. 39a-46a. Judge Randolph agreed with the disposition on mootness but dissented from the denial of rehearing. He noted that "further doubts have been raised about the majority's interpretation" of Section 1152(a)(1). Pet. App. 49a. He pointed out that, in a companion case,[11] the government argued that Section 1152(a)(1) governs

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[11] While the government's rehearing petition in this case was pending in the court of appeals, a separate action (now known as *Lisa Le* v. *United States Department of State, Bureau of Consular Affairs*) was filed in the United States District Court for the District of Columbia by another screened-out Vietnamese migrant in Hong Kong and her sponsor in the United States. No. 95-989 (summary judgment granted Mar. 2, 1996), appeal pending, Nos. 95-5425, 96-5058 (D.C. Cir.). Those plaintiffs' claims became moot after the United States Consulate in Hong Kong processed the migrant's visa application (pursuant to a preliminary injunction issued by the district court, which the court of appeals refused to stay) and granted her an immigrant visa. Twenty-five more screened-out migrants and their 25 sponsors entered the *Lisa Le* case as additional plaintiffs. On March 1, 1996, the district court granted summary judgment for all but two of those additional plaintiffs (who were denied intervention), reasoning that the case was, "in all relevant respects, identical" to this one. Pet. App. 70a. The district court permanently enjoined the government from "implementing [its] decision to decline processing plaintiff detainees' immigrant visa applications at the United States Consulate in Hong Kong." *Id.* at 73a. The government appealed the district court's injunctions in *Lisa Le* to the D.C. Circuit and suggested that the case be heard initially by the court of appeals en banc, so that the full court could reconsider the panel's decision in the present case. The full court granted initial hearing en banc in *Lisa Le* (*id.* at 74a-75a) and also stayed the district court's injunctions. After this Court granted plenary review in this case, the D.C. Circuit, on June 26, 1996, granted the appellees' motion to suspend the en banc proceedings in *Lisa Le* pending the outcome of this case.

only the issuance of visas, not "where visa applications must be processed," and that consular venue determinations are, in any event, "entrusted entirely to the Secretary of State." *Ibid.* Those arguments were also presented in the government's petition for rehearing and suggestion of rehearing en banc (at 5-6, 10-13) in this case. The full court of appeals nonetheless rejected the government's suggestion of rehearing en banc, with four judges dissenting. Pet. App. 50a-51a.

INTRODUCTION AND SUMMARY OF ARGUMENT

For important reasons of foreign policy, the Department of State has determined that immigrant visa applications from migrants determined under the Comprehensive Plan of Action not to be refugees should be accepted only in those migrants' country of origin, and not in the countries to which they have illegally migrated. The Department made that policy decision after concerns were raised by the international community that processing applications for immigrant visas to the United States from screened-out Southeast Asian migrants was disrupting the process of voluntary repatriation of those migrants, by giving them a strong incentive to remain in countries of first asylum. The Department's "consular venue" policy does not affect any of the substantive standards for processing migrants' immigrant visa applications. No migrant who returns to his or her home country and applies there will be subject to stricter substantive standards as a result.

The court of appeals concluded that the State Department's policy violates 8 U.S.C. 1152(a)(1), which (among other things) prohibits discrimination on the basis of nationality in the issuance of an immigrant visa. That decision is wrong on several accounts, and is profoundly damaging to the State Department's ability to respond to

the international disruption caused by massive uncontrolled migration. The international community's experience with migration in Southeast Asia has demonstrated that uncontrolled migration presents difficult issues requiring a coordinated international response. Humanitarian concerns must be balanced with neighboring countries' need and right to control their borders; refugees with legitimate claims to asylum must be distinguished from economic migrants having lesser claims on the international community to resettlement. As part of its response to the crisis of massive migration in Southeast Asia, the State Department concluded, along with the rest of the international community, that screened-out migrants who do not have a legitimate claim to refugee status should return to their home countries, and that continued processing of those migrants' immigrant visa applications in first-asylum countries would deter them from returning. The court of appeals had no basis for setting aside that determination.

I. A. Congress has precluded judicial review of the Department of State's consular venue policy challenged in this case. See 5 U.S.C. 701(a)(1). Although there is a presumption of judicial review of agency action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, that presumption does not apply, or at the very least is rebutted, in situations like this one, touching directly on foreign policy. This case involves the power to exclude aliens from the Nation, a power that is integrally related to the conduct of foreign relations. The Court has always viewed the exclusion power as reserved entirely to the political Branches of the national government, without judicial intervention, except under such circumstances as Congress expressly authorizes or the Constitution requires. The doctrine of consular nonreviewability, holding that courts have no authority to review visa determina-

tions concerning aliens abroad, reflects that policy of judicial non-interference in exclusion decisions.

Congress has not expressly provided any right to judicial review of exclusion policies or related decisions at the behest of aliens residing abroad or their United States sponsors. To the contrary, Congress made clear in 1961 that exclusion decisions may not be challenged under the APA, and may be challenged only by aliens who have arrived at a port of entry to the United States and are in the custody of United States authorities, by means of the writ of habeas corpus. When Congress acted in 1961, this Court had already rejected the suggestion that exclusion decisions could be challenged by aliens residing abroad. It is unimaginable that Congress intended to allow aliens residing abroad to challenge decisions or policies concerning their admission to the United States from overseas, and thereby to avoid the custody requirement of the habeas corpus remedy. It is even more difficult to believe that Congress intended for exclusion policies to be challenged by those aliens' United States sponsors, who are less directly affected than the aliens abroad by matters such as the consular venue rule challenged here.

B. Judicial review is unavailable in this case for the additional reason that consular venue decisions are committed to the discretion of the Department of State by law. See 5 U.S.C. 701(a)(2). Under 8 U.S.C. 1202(a), the Secretary of State has broad discretion to determine where aliens shall apply for visas. Section 1202(a) provides no substantive standards for review of that discretion, and the Department's consular venue rules must balance a large number of factors, including the state of relations with foreign countries, security concerns, and resources. There is no "law to apply" in judicial review of those determinations. Indeed, although respondents contend that the venue rule here discriminates on the basis of nationality,

consular venue rules must always take account of an alien's nationality, since the Department must determine in what countries, and where in such countries, visa applications will be accepted. There is no meaningful way to determine whether citizens of those foreign countries are similarly situated, such that one might conclude that consular venue rules "discriminate" on the basis of nationality.

II. A. If the Court nevertheless reaches the merits, the judgment of the court of appeals should be reversed on the ground that the challenged policy does not violate the anti-discrimination rule of Section 1152(a)(1). Section 1152(a)(1) does not apply to consular venue policies. That Section prohibits discrimination on the basis of nationality in the "issuance" of a visa, but does not speak to the place where an alien must apply for a visa. That matter is governed separately by Section 1202(a), which gives the Secretary broad discretion to establish consular venue rules. In its mistaken conclusion that Section 1152(a)(1) applies to consular venue, the court of appeals overlooked the placement of that provision among sections otherwise establishing substantive visa preferences and numerical limits on the number of visas to be issued (in total and to nationals of any particular country). Section 1152(a)(1) only prohibits discrimination on the basis of nationality in granting or denying visas, other than in accordance with those numerical limits.

B. The consular venue policy at issue here does not "discriminate" in visa issuance on the basis of nationality. The policy does not distinguish among aliens on the basis of their nationality, but rather on the basis of their status as "screened-out" under the CPA (or not). Screened-out Vietnamese and Laotian migrants may not apply for immigrant visas in Hong Kong, but "screened-in" Vietnamese and Laotian migrants, and also all other

Vietnamese nationals residing legally or illegally in Hong Kong, may do so. Even if we assume that the policy does distinguish on the basis of nationality in that it is relevant only to Vietnamese (or Southeast Asian) migrants, it nonetheless does not "discriminate," because there are no nationals of any other countries who are similarly situated. The venue policy here was a reasonable response to a crisis affecting nationals of only certain countries, and it is at present relevant only with regard to those nationals. Moreover, because the policy has no effect on substantive admission standards, it does not affect the number of visas that may ultimately be "issued," and Vietnamese nationals have in fact been among the greatest recipients of immigrant visas in recent years. Respondents therefore cannot sustain their claims of "discrimination" in any event.

ARGUMENT

I. THE DEPARTMENT OF STATE'S CONSULAR VENUE POLICIES ARE NOT SUBJECT TO JUDICIAL REVIEW

The court of appeals ruled that United States citizen sponsors of aliens who reside abroad and are seeking admission to the United States may challenge, under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the Department of State's decision that immigrant visa applications should be reviewed only in a particular place. Pet. App. 5a-6a. That decision is incorrect. Consular venue determinations are not subject to judicial review under the APA, at the behest of either aliens residing abroad or their sponsors in the United States, for two reasons. The INA implicitly precludes such judicial review, and consular venue decisions are committed to agency discretion by law. See 5 U.S.C. 701(a)(1) and (2).

A. Judicial Review of Consular Venue Determinations Is Precluded By The Immigration And Nationality Act

"The APA confers a general cause of action upon persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,' but withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review.'" *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984) (citations omitted). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Ibid.*; see *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943).

Although there is a "presumption" favoring judicial review, that presumption, "like all presumptions, * * * may be overcome" in a variety of ways under a particular statute, including specific statutory language, the legal background against which the statute was enacted, and "inferences of intent drawn from the statutory scheme as a whole." *Community Nutrition Institute*, 467 U.S. at 349; see *Heikkila* v. *Barber*, 345 U.S. 229 (1953). And the presumption itself "runs aground" in certain areas, such as national security and foreign affairs, which have traditionally been thought not to be fit subjects for judicial intervention. See *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988). This case involves an area in which similar concerns are present, for the Department of State's consular venue policies involve diplomatic and political considerations inappropriate for second-guessing by the courts. Indeed, the exercise of the visa function by consu-

lar officials has traditionally been a field of non-intervention by the courts.

1. a. Analysis of the availability of judicial review must begin with the recognition that this case fundamentally involves the power of *exclusion*—that is, the power of the Executive and Legislative Branches to determine which aliens may or may not be permitted to enter the United States, and under what circumstances such entry may be allowed. It has long been settled that the power of exclusion is, by its nature, a political and diplomatic matter under the plenary control of the political Branches, not subject to judicial review except under such conditions as Congress may expressly authorize. As the Court stressed in considering Congress's authority under the Immigration Act of 1891 to prohibit the landing of certain classes of aliens:

> In the United States this power is vested in the national government, which the Constitution has committed to the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and the Senate or through statutes enacted by Congress[.]

Nishimura Ekiu v. *United States*, 142 U.S. 651, 659 (1892). The courts accordingly have no power to intervene in the exercise of that power, except as Congress may expressly authorize or the Constitution may require:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by

> statute, or is required by the paramount law of the Constitution, to intervene.

Fong Yue Ting v. *United States*, 149 U.S. 698, 713 (1893). See also *Lem Moon Sing* v. *United States*, 158 U.S. 538, 546-547 (1895); *Fok Yung Yo* v. *United States*, 185 U.S. 296, 302 (1902).

Excludable aliens actually detained by immigration officials at ports of entry traditionally have had access to the writ of habeas corpus to contest the legality of their detention. See *Nishimura Ekiu*, 142 U.S. at 660. That very limited provision for judicial involvement is triggered by the fact of custody, however, not by an inherent suitability of exclusion matters for judicial review. It therefore does not afford aliens a broad, presumptive right to contest the legality of administrative actions involving their exclusion from or admission into the United States. Quite the contrary; "Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country." *Fok Yung Yo*, 185 U.S. at 305.

These principles have been reaffirmed by the Court in decision after decision. In *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950), the Court again stated that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation," and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." See also *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210, 213 (1953); *Heikkila* v. *Barber*, 345 U.S. 229, 233-234 (1953).[12] And more recently, in *Fiallo* v. *Bell*, 430 U.S. 787

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[12] "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in

(1977), where the Court upheld against constitutional challenge a provision of the INA granting an immigration preference to the mother, but not the father, of an illegitimate child United States citizen, the Court reiterated that "[t]he conditions of entry for every alien * * * have been recognized as matters * * * wholly outside the power of [the courts] to control." *Id.* at 796 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596-597 (1952) (Frankfurter, J., concurring)).

b. The system for issuance of visas to aliens residing abroad by United States consular officials is integral to the exercise of the sovereign power of exclusion.[13] Although the issuance of a visa does not provide an alien with the right of admission or entry into the United States,[14] it

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regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

[13] In fact, the development of the visa system came about in large part in this century as a result of increasingly strict substantive controls on immigration. See 2 Charles Cheney Hyde, *International Law* 1367 (2d rev. ed. 1945). During World War I, the State Department required visas of all aliens seeking entry into the United States. The Immigration Act of May 26, 1924 (ch. 190, 43 Stat. 153), which established the system of numerical quotas that governed immigration to the United States for the following forty years, required United States consular officials to determine the admissibility of aliens into the United States. Visas issued by consular officials became a necessary (though not sufficient) condition for admission into the United States. See § 2(f) and (g); 3 Green Haywood Hackworth, *Digest of International Law* 741-742 (1942) (treatise by State Department Legal Adviser).

[14] See 8 U.S.C. 1201(h). A visa authorizes an alien to travel to a port of entry of the United States and to seek admission there. *Ibid.* In essence, it gives notice to officials of other countries and U.S. immigration officials that the alien has the United States Government's permission to travel to a port of entry of the United States in order to seek admission there.

does constitute a decision by a consular official that the alien appears to satisfy the conditions for entry established by Congress and the Executive Branch. The visa function thus deters excludable aliens residing abroad from attempting to secure passage and entry to the United States, and it also relieves immigration officials in the United States of much of the burden of detaining excludable aliens at ports of entry. The requirement of a visa is therefore no less an exercise of the "political" power of exclusion than is the establishment of classifications of aliens eligible and ineligible for admission.

The same is true of the establishment of the conditions under which a visa may be obtained. Indeed, commentators have noted, with respect to the requirement of a "passport visa" for foreign travel, important variations in countries' practices with regard to the place at which a visa might be obtained:

> Some foreign countries, before recognizing the validity of a passport, require that a visa, or *vise*, shall be, or shall have been affixed to it. * * * Sometimes it is required that the visa be affixed in the country where the passport is issued, by a diplomatic or consular officer of the government requiring it; sometimes simply by such officer anywhere; sometimes at the frontier of the country to which admission is sought.[15]

Longstanding State Department practice reflects the reality that the *place* at which a visa may be obtained is an

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[15] 2 Charles Cheney Hyde, *supra*, at 1198 (quoting Gaillard Hunt, *The American Passport*); 3 John Bassett Moore, *A Digest of International Law* 994 (1906) (treatise by former Assistant Secretary of State).

important part of the diplomatic and political aspect of the power to control immigration. For example, the Department has ordinarily required an alien to apply for an immigrant visa from the consular district in which his or her residence is located, because consular officials in that country will have the necessary expertise to evaluate the alien's visa application, and because adverse information about the alien may not be available elsewhere. See Pet. 17; 59 Fed. Reg. 39,953 (1994). Before 1946, however, the Department permitted nonquota immigrants (who benefited from more lenient immigration rules) to apply outside their home districts under certain circumstances. See *id.* at 39,952-39,953. In the Immigration and Nationality Act of 1952, Congress declined to adopt a restrictive statutory rule requiring all immigrant visa applicants other than displaced persons to apply in their home districts, and expressly authorized the Secretary of State to establish a "more flexible requirement regarding the place of filing of visa applications in both nonimmigrant and immigrant cases." *Id.* at 39,953 (quoting H.R. Rep. No. 1365, 82d Cong., 2d Sess. 54 (1952)). And the State Department has today numerous consular venue rules turning on nationality that reflect security, diplomatic, and management concerns.[16]

In recognition of the political nature of the visa function, and the fact that Congress has never expressly authorized judicial review of consular matters, the courts have long adhered to the doctrine of consular nonreview-

[16] For example, because the Department does not process immigrant visas in their countries, it has directed Afghanis to apply for immigrant visas in Islamabad; Iranians in Abu Dhabi, Ankara, Vienna or Naples; Iraqis in Amman or Casablanca; Lebanese in Abu Dhabi, Damascus, or Nicosia; Libyans in Tunis or Valletta; and Somalis in Nairobi, Dares-Salaam, and Djibouti. See Pet. 17-18.

ability. That doctrine provides that visa decisions by United States consular officers are not reviewable by the judiciary (except perhaps to the extent that a United States citizen claims that the denial of a visa has violated his or her own constitutional rights).[17] The preclusion of judicial review for that category of decisions is a consequence of the "power of Congress to exclude aliens altogether from the United States * * * without judicial intervention." *Ventura-Escamilla* v. *INS*, 647 F.2d 28, 30 (9th Cir. 1981). It is also based on the historically political nature of a visa decision, such that disputes regarding visa applications are matters for "diplomatic resolution" between nations, not judicial redress. *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928).

2. a. This Court acknowledged the established rule that aliens residing abroad have no basis for judicial review of exclusion decisions in *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). In that case, the Court held that an alien physically present in the United States who had been determined by immigration authorities to be excludable could contest the validity of the exclusion order

[17] See *City of New York* v. *Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989); *Centeno* v. *Shultz*, 827 F.2d 1212, 1213 (5th Cir. 1987) (per curiam); *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970 (9th Cir. 1986); *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222 (5th Cir. 1975) (per curiam); *Loza-Bedoya* v. *INS*, 410 F.2d 343, 347 (9th Cir. 1969); *Cobb* v. *Murrell*, 386 F.2d 947, 950 (5th Cir. 1967); *Braude* v. *Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965); *Montgomery* v. *FFrench*, 299 F.2d 730, 735 (8th Cir. 1962); *United States ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929). Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972) (constitutional challenge to visa denial); *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049-1052 (D.C. Cir. 1986) (statutory and constitutional challenge to visa denial), aff'd by an equally divided Court, 484 U.S. 1 (1987).

by seeking a declaratory judgment under the APA.[18] The Court concluded that the then-recently enacted Immigration and Nationality Act of 1952, unlike the predecessor 1917 immigration statute, had not precluded such review and had not remitted aliens in exclusion proceedings to the limited remedy of habeas corpus. See *id.* at 184-186. In reaching that conclusion, the Court pointed to the legislative history of the 1952 statute, in which the managers of bill in the House of Representatives had stated that "the safeguard of judicial procedure [under the APA] is afforded the alien in both exclusion and deportation proceedings." *Id.* at 186 (quoting H.R. Rep. No. 2096, 82d Cong., 2d Sess. 127 (1952)).

At the same time, the Court limited the geographic reach of its ruling by cautioning that "[w]e do not suggest, of course, that an alien who has never presented himself at the border of this country may avail himself of the declaratory judgment action by bringing the action from abroad." *Tom We Shung*, 352 U.S. at 184 n.3. The Court quoted from the explanation in the Senate Report of the deletion from the bill of a provision that would have expressly limited judicial review of exclusion determinations to habeas corpus proceedings, which stressed that the deletion "was not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." *Id.* at 185 n.6 (quoting S. Rep. No. 1137, 82d Cong., 2d Sess. 28 (1952)).

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[18] The Court had previously held, in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), that the Immigration and Nationality Act of 1952 did not preclude challenges under the APA to *deportation* orders, which before passage of the 1952 Act could have been challenged only by habeas corpus proceedings. See *Heikkila* v. *Barber*, 345 U.S. 229 (1953).

In 1961, Congress reacted to the *Tom We Shung* decision by precluding APA suits to challenge both exclusion and deportation orders. Noting that, "[f]or three-quarters of a century, prior to the decision in the *Shung* case, habeas corpus was the sole and exclusive method for testing in court an administrative determination that an alien was not entitled to enter the United States," H.R. Rep. No. 1086, 87th Cong., 1st Sess. 31 (1961), Congress returned judicial review of exclusion decisions to that *status quo ante*. Under 8 U.S.C. 1105a(b), "[n]otwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made * * * may obtain judicial review of such order by habeas corpus proceedings and not otherwise." See Pub. L. No. 87-301, § 5(a), 75 Stat. 651.[19] Cf. *Ardestani* v. *INS*, 502 U.S. 129, 133-134 (1991) (INA supersedes APA with respect to administrative procedures).

Congress did not, in 1961, use express terms to declare that aliens residing abroad were foreclosed from seeking judicial review of exclusion decisions and policies under the APA. That is, however, the necessary and unmistakable effect of its action. As a practical matter, because aliens challenging exclusion decisions are limited to habeas corpus relief, and because they must be in the custody of United States officials to seek such relief, aliens abroad cannot challenge exclusion decisions in United States courts. The habeas corpus remedy, as the legislative history of the 1961 amendments pointed out, requires an alien to bring the action "in the location where the alien is, where he has been excluded, and where

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[19] Congress also simultaneously removed judicial review of deportation orders to the courts of appeals in order to expedite the process of review. See H.R. Rep. No. 1086, *supra*, at 28-29; 8 U.S.C. 1105a(a).

he is 'knocking at the door,'" not (as here) by "burden[ing] an already overwhelmed court system in the District of Columbia by there instituting a declaratory judgment [action]." H.R. Rep. No. 1086, *supra*, at 33.

In light of the settled understanding of the law in 1961—including this Court's recognition in *Tom We Shung* that the 1952 Act had not been intended to allow any right of review to aliens residing abroad—it would be inconsistent with the structure Congress erected to allow aliens abroad to bypass the habeas corpus remedy entirely and seek review under the APA. Permitting an APA suit, the House Report stated, would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." *Ibid.*

b. Given the subject matter at issue, the usual presumption in favor of judicial review does not operate in this context. Cf. *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (presumption of review not appropriate in national security context). The legal background against which Congress enacted the APA and the Immigration Acts of 1952 and 1961 established a contrary presumption that immigration statutes afford no right of review of exclusion policies, and that any such right beyond the writ of habeas corpus must be *expressly* authorized by Congress. No such right has been provided to aliens residing abroad.

Even if the presumption of judicial review did operate here, it has surely been rebutted. The "nature of the administrative action" and the "type of problem involved" (*Community Nutrition Institute*, 467 U.S. at 345; *Switchmen's Union*, 320 U.S. at 301) weigh heavily against recognizing a right of judicial review in this situation. As we have explained, the Court has long recognized exclusion as an inherently political power within the plenary

control of the Executive and Legislative Branches. Consular venue determinations play an important role in the formulation of immigration policy relating to exclusion and admission. Diplomatic, management, and security considerations may well be brought to bear in the Department of State's decisions as to where visa applications shall be accepted from nationals of certain countries. See p. 24, *supra*; see also pp. 37-38, *infra*.

Congress's action in 1961 to eliminate APA review of exclusion and deportation orders compels the conclusion that no APA review is available in this case. Indeed, the fact that Congress expressly authorized some non-APA judicial review for particular classes of immigration determinations (exclusion and deportation orders affecting aliens physically present in the United States) strongly indicates that it intended to preclude APA review at the behest of aliens residing abroad. With respect to exclusion orders in particular, it was of great importance to Congress that aliens challenging their exclusion be remitted to the remedy of habeas corpus, which requires that the alien be physically present in the United States and in the custody of United States authorities.[20] See p. 27, *supra*. It is difficult to believe that Congress would have allowed aliens to evade the prerequisite of custody by challenging exclusion policies from abroad.[21] "In the context of the

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[20] Aliens in the custody of United States authorities outside the territorial jurisdiction of the United States have no right to challenge their confinement in habeas corpus proceedings. See *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950); cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269, 271, 273-275 (1990).

[21] Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 623-625 (1984) (holding that, under the Social Security Act's judicial review provisions for Medicare Part A reimbursement decisions, a party cannot obtain review of an HHS regulation governing reimbursement for a medical procedure before a claim for reimbursement is filed, and acknowledging that,

statute's precisely drawn provision, the omission [of judicial review for aliens residing abroad] provides persuasive evidence that Congress deliberately intended to foreclose further review of [their] claims." *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). See also *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498, 1506-1507 (11th Cir.), cert. denied, 502 U.S. 1122 (1992).

3. Apparently appreciating the obstacles to finding a right of judicial review at the behest of the aliens themselves, the court of appeals "decline[d] to reach" that issue, and instead found a right to review at the behest of the United States citizens sponsoring the aliens' admission. Pet. App. 5a-6a. It is unlikely, however, that Congress would have precluded judicial review at the behest of an alien residing abroad, and yet at the same time would have afforded such review to a United States citizen relative—or to an employer seeking to sponsor an alien's admission, see 8 U.S.C. 1154(a)(1)(D)—who is less directly affected by consular decisions and policies. Indeed, in the consular nonreviewability cases, the courts have made no distinction between aliens seeking review of adverse consular decisions and the United States citizens sponsoring their admission; they have held that judicial review is unavailable to both.[22]

A necessary premise for the court of appeals' conclusion that United States relatives have standing is that the statutory provisions on which respondents rely afford greater rights to the United States sponsors than to the

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under that construction, a party would have to undergo the medical procedure in order to test the validity of the regulation).

[22] See *City of New York* v. *Baker*, 878 F.2d at 512; *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d at 970; *Wan Shih Hsieh* v. *Kiley*, 569 F.2d at 1181.

aliens themselves with respect to the aliens' application for a visa. Nothing in the text or structure of the INA supports that proposition. While the INA affords a United States citizen a right to file a petition with the Attorney General to have the alien abroad classified as having the relationship that is a necessary condition for issuance of a preference or immediate relative visa (see 8 U.S.C. 1154(a); 8 C.F.R. 204.1(a)), the sponsoring citizen's cognizable interest terminates when that petition is approved. The INA affords the citizen-sponsors no rights in connection with visa determinations affecting aliens abroad, or with exclusion proceedings concerning aliens who have reached our shores. See 8 U.S.C. 1105a(b) (any "alien" against whom a final order of exclusion has been made may obtain judicial review of such order by habeas corpus proceedings); 8 U.S.C. 1226(b) ("alien" may appeal to Attorney General from decision of special inquiry officer).

The court of appeals' premise is similar to the proposition that was rejected in *Fiallo* v. *Bell*, 430 U.S. 787 (1977). In that case, the Court rejected a constitutional challenge to the statutory immigration preference for the alien mothers, but not fathers, of illegitimate children who are United States citizens or lawful permanent residents. The Court noted that the plaintiffs in that case contended that, "since the statutory provisions were designed to reunite families wherever possible, the purpose of the statute was to afford rights not to aliens but to United States citizens and legal permanent residents." *Id.* at 793. The Court found nothing to suggest that "Congress has anything but exceptionally broad power to determine which classes of aliens may lawfully enter the country," and it noted that it had "resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and ha[d] rejected the suggestion that more searching judicial scrutiny is required." *Id.* at 794.

The court of appeals relied on its prior decision in *Abourezk* v. *Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987), for the proposition that United States citizens have a right to review under the APA of consular visa decisions. In *Abourezk*, the D.C. Circuit relied on two sources of authority to conclude that such review was available. First, it noted that this Court, in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), had resolved the merits of a First Amendment challenge brought by United States citizens to a decision by the Attorney General not to grant a waiver to an excludable alien who resided abroad and had sought a nonimmigrant visa. See 785 F.2d at 1050. *Kleindienst*, however, is distinguishable from this case precisely because it involved a challenge regarding the constitutional rights of United States citizens—specifically, a claim that the denial of a visa to an alien abroad violated the First Amendment rights of the citizens to receive information. In light of the serious constitutional questions that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim brought by a United States citizen, this Court has articulated a very strong presumption that constitutional claims may be heard in the federal courts. See *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). In this case, however, no claim of a violation of the constitutional rights of United States citizens was before the court of appeals.[23]

[23] In *Abourezk*, the plaintiffs raised both statutory and constitutional challenges to the visa denials at issue in that case. The court believed itself obligated to consider the statutory issues in order to avoid reaching the constitutional questions. See 785 F.2d at 1052 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). This case, however, is unlike *Abourezk* in that here it is not necessary to construe a statute in order to determine whether a

Second, the *Abourezk* court relied on a jurisdictional provision in the INA, 8 U.S.C. 1329, which states that the district courts "shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [of the INA]." See 785 F.2d at 1050; see also *Karmali* v. *INS*, 707 F.2d 408, 409-410 (9th Cir. 1983). To the extent that *Abourezk* relied on Section 1329 to find a right of review, it was mistaken. Section 1329 is only a jurisdictional statute; unlike the APA, it does not provide a cause of action. It therefore no more furnishes a basis for judicial review than does, for example, the general federal-question jurisdictional statute, 28 U.S.C. 1331. Cf. *Califano* v. *Sanders*, 430 U.S. 99 (1977). If there is a right of review, it must be in the APA; but, as we have explained, the INA precludes whatever review would otherwise be available under the APA.[24]

4. Respondents argue (Br. in Opp. 21) that the principles discussed above do not bar judicial review of their claim because they are not seeking review of a specific consular visa decision; rather, they are challenging a policy that affects where such determinations will be made. The principles we have discussed, however, are not

constitutional challenge to an application of that statute has merit. Cf. *Abourezk*, 785 F.2d at 1062-1063 & n.1 (Bork, J., dissenting).

[24] Section 1329 was enacted as part of the Immigration and Nationality Act of 1952. See Act of June 27, 1952, ch. 477, Tit. II, § 279, 66 Stat. 230. The legislative history does not indicate the reason for its enactment, but it may have been deemed necessary because of the then-existing amount-in-controversy requirement of the general federal-question statute. See *Acosta* v. *Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1977). This Court has never suggested that Section 1329 provides a right of review independent of any that might be available under the APA. Had such an argument been considered a reasonable reading of Congress's intent in the 1952 immigration act, it would surely have been made in *Tom We Shung* and *Pedreiro*, which held that the 1952 law made exclusion and deportation orders reviewable under the APA.

limited to the specific doctrine of consular nonreviewability, although they certainly are the basis for it. They are broader, for they reflect this Court's understanding that, as a general matter, the Executive Branch's policy determinations in the exercise of the essentially political power of exclusion are not subject to judicial review, absent express authorization by Congress. The fact that this case does not challenge a specific decision to deny a visa to a specific individual is beside the point.

Thus, this case is not like *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). In that case, the Court held that Congress had not intended to foreclose judicial review of the validity of an agency regulation establishing the method by which Medicare Part B benefits were to be calculated, even though it had precluded judicial review of administrative decisions of the amounts due to claimants in particular cases. See *id.* at 675-676. There, the Court was construing the statute in question against a background presumption of judicial review of administrative action, *id.* at 670, which, as we have argued, is not applicable here. The principle of judicial nonintervention in the power of exclusion rests not on a particular statute precluding judicial review, but on a broader understanding about the proper roles of the Branches of the national government in a political matter directly tied to relations with foreign countries.

Under respondents' theory—which gives controlling significance to the difference between individual visa decisions by consular officials and rules applicable to a category of visa applications—aliens residing abroad and their United States sponsors would be able to challenge, under the APA, State Department regulations applying substantive criteria for the grant or denial of a visa, even though the outcome of such a challenge could effectively dictate whether the plaintiff was entitled to receive a visa.

Such an outcome would undoubtedly have surprised the Members of Congress who, in enacting the 1961 immigration amendments, rejected the "fallacious doctrine" that aliens have a "right" to enter the United States that may be litigated in federal court. See p. 26-28, *supra*.[25]

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[25] Even if review is not precluded by the APA, we believe that neither respondent LAVAS (a legal-rights organization) nor the United States citizen-sponsor respondents in this case are within the "zone of interests" protected by the relevant provision of the INA. They therefore have no right of review under the APA, for they are not aggrieved "within the meaning of the relevant statute." See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); 5 U.S.C. 702. There is no indication that the non-discrimination provision of Section 1152(a)(1) was intended to advance the interests of legal-rights organizations. Cf. *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). Sponsoring family members are also not within the zone of interests protected by Section 1152(a)(1). That anti-discrimination provision focuses on the person to whom a visa might be issued, not the sponsor, and it operates without regard for the basis on which an alien might qualify for an immigrant visa (such as a family preference). Any legally cognizable interest that the sponsor has in the admission process ends with the processing of his petition by the INS. Furthermore, while we have not presented redressability as a separate issue for review, we note that, although the alleged harm to the sponsors is prolonged separation from family members, the relief sought here will not necessarily redress that harm. Even if respondents were to prevail in this case, and the migrants' immigrant visa applications were then processed in Hong Kong, those visa applications could be denied. Because the alleged harm to the sponsors results "indirectly" from application of the consular venue rules to the mi-grants, it is "substantially more difficult" for the sponsors to show that "prospective relief will remove the harm." *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975).

B. Consular Venue Determinations Are Committed By Law To The Discretion Of The Secretary Of State

Judicial review is not available in this case for a second reason: consular venue determinations are committed to the discretion of the Secretary of State by law. See 5 U.S.C. 701(a)(2). The Secretary decides where aliens shall apply for visas under the authority of 8 U.S.C. 1202(a), which provides that "[e]very alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." Section 1202(a) "make[s] explicit the Secretary's authority to determine by regulations the place of immigrant visa application," and such consular venue regulations "have always been intended for the benefit of the Government, giving it the flexibility to decide where immigrant visa applications will be processed." 59 Fed. Reg. 39,954 (1994). Indeed, Section 1202(a) itself establishes no substantive standards for the exercise of the consular venue authority by the Secretary.

This Court explained in *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), that, under Section 701(a)(2), review under the APA is unavailable "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). "[E]ven where Congress has not affirmatively precluded review, review [under the APA] is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). When an agency's decision "involves a complicated balancing of a number of factors which are peculiarly within its expertise," such that it is "impossib[le] [to] devise an adequate standard of review for such an agency action," review is

barred by 5 U.S.C. 701(a)(2). See *Lincoln* v. *Vigil*, 113 S. Ct. 2024, 2031-2032 (1993).[26]

The Secretary of State's policy decisions as to *where* immigrant visa applications may be filed and will be accepted involve exactly the kind of "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," such that there is no meaningful standard of review for a court to apply. Consular venue decisions rest on numerous diplomatic, security, and management considerations, all of which can change rapidly within a very short time.[27] The United States Government's decision to open a consulate often rests on diplomatic considerations; the United States, for example, does not have consulates in countries with which it lacks diplomatic relations, and the number of United States consulates in a particular country may well reflect the current state of relations with that country. Moreover, "the [State] Department frequently has to adjust its handling of the visa workload because of world events." 59 Fed. Reg. 39,954 (1994).

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[26] The Court's decision in *Lincoln* v. *Vigil* also notes that certain kinds of agency actions have been "*traditionally* regarded as committed to agency discretion." 113 S. Ct. at 2031 (emphasis added). Consular venue rules surely fall in that category, for they have traditionally been regarded as existing primarily for the benefit of the government, to give consular officials flexibility to decide where immigrant visa applications will be processed. 59 Fed. Reg. 39,954 (1994). And, as our discussion of the doctrine of consular nonreviewability shows (pp. 24-25, *supra*), consular decisions to deny visas have always been regarded as matters inappropriate for judicial review.

[27] For that reason, although the State Department's current consular venue regulation presumptively provides that an alien shall apply for an immigrant visa in the consular district having jurisdiction over his residence, it also reserves to the Department the authority to direct otherwise. See 22 C.F.R. 42.61(a).

Security considerations are also of great importance in determining where immigrant visa applications will be accepted, in at least two regards. First, even if the United States has diplomatic relations with a country, the security situation in that country may be such that the State Department deems it inadvisable to send consular officials there, and the Department may require nationals of that country to apply for immigrant visas elsewhere.[28] Second, when applications from nationals of a particular country raise security concerns (as, for example, with terrorism), it is particularly important for those applications to be reviewed by consular officials with expertise about local conditions. See 59 Fed. Reg. at 39,954.

Management concerns also play a considerable role in determining where immigrant visa applications shall be accepted. The State Department cannot have consular officials available to accept visa applications in every major population center in every country, and so the Department must balance resource constraints against the desire to make the visa application process reasonably convenient for aliens seeking to apply for admission. Demand for visa applications fluctuates, even without regard to changes in political events, and the Department needs flexibility in responding to such fluctuations.

Respondents contend that, whatever the extent of the Department's discretion in setting consular venue policies, those policies cannot be based on any of the factors that Section 1152(a)(1) makes legally impermissible considerations with regard to the decision to grant or deny a visa, including nationality. By their very nature, however, consular venue rules often take account of nationality, and there is no meaningful standard for a

[28] Such is currently the case with immigrant visa applications from Lebanese nationals. See p. 24 n.16, *supra*.

court to determine whether those rules impermissibly "discriminate" on that basis. For example, assume that the United States has three consulates in Russia at which immigrant visa applications are accepted (two of which accept applications only from Russian citizens), but that it has only one consulate in China that accepts immigrant visa applications. Such a difference might be attributable to the current state of the United States' diplomatic relations with those two countries, or to current demand for visas, or to special processing requirements made necessary for security reasons. Whatever the reasons, the practical effect might well be that it was significantly more difficult for Chinese citizens to apply for immigrant visas than it would be for Russian citizens. It would be impossible, however, to fashion a standard to determine whether that difference constituted "discrimination" on the basis of nationality, since the difference would be attributable to legitimate concerns peculiarly within the State Department's expertise and discretion. Indeed, any attempt to make such a judgment would impinge on the Executive Branch's policy-making discretion in sensitive areas involving foreign relations.[29] See also *Haitian Refugee Center*, 953 F.2d at 1507-1508.

[29] 5 U.S.C. 702(1) authorizes the court to dismiss an APA action "on any other appropriate legal or equitable ground," including the possibility that the action might require the court "to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference on Judicial Review). That report of the Administrative Conference led to the 1976 amendments to the APA, including the relevant portion of Section 702(1). See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976).

II. THE CONSULAR VENUE POLICY CHALLENGED IN THIS CASE DOES NOT VIOLATE THE ANTI-DISCRIMINATION RULE OF 8 U.S.C. 1152(a)(1)

A. Section 1152(a)(1) Does Not Apply To Consular Venue Rules

Even if judicial review of consular venue determinations is available, the decision of the court of appeals should nonetheless be reversed, for it is premised upon a legally incorrect construction of 8 U.S.C. 1152(a)(1). That subsection provides in pertinent part:

> [N]o person shall receive any preference or priority or be discriminated against *in the issuance of an immigrant visa* because of the person's race, sex, nationality, place of birth, or place of residence.

(Emphasis added.) The panel majority believed that Section 1152(a)(1) governs consular venue decisions and prohibits the Secretary of State from making any distinctions based on nationality in deciding where immigrant visa applications shall be accepted. That construction of Section 1152(a)(1) is erroneous.[30]

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[30] Both Houses of Congress have approved bills that would correct the court of appeals' erroneous construction of Section 1152(a)(1). Both Houses have passed an amendment to Section 1152(a)(1) that would provide: "Nothing in [paragraph (1)] shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." See H.R. 2202, § 803, 104th Cong., 2d Sess. (1996) (passed by the House of Representatives on Mar. 21, 1996, see 142 Cong. Rec. H2639-H2640 (daily ed. 1996)); H.R. 2202, § 172, 104th Cong., 2d Sess. (1996) (passed by the Senate on May 2, 1996, see 142 Cong. Rec. S4611 (daily ed. 1996). Those provisions are part of broader House and Senate immigration bills currently pending before a House-Senate Conference Committee. We will advise the court of any further pertinent developments regarding the legislation.

1. Section 1152 establishes a uniform annual numerical limit on immigrant visas for nationals of each foreign country, expressed as a percentage of all immigrant visas made available for aliens seeking admission to the United States.[31] Subsection (a)(1) provides that, beyond those numerical limits, a consular officer is not permitted to take into account the applicant's race, sex, nationality, place of birth, or place of residence when deciding whether to grant or deny an immigrant visa. That is the import of the Section's prohibition against certain discrimination "in the *issuance* of an immigrant visa."

Nothing in Section 1152 suggests that the prohibition applies to other aspects of the visa application process, including consular venue. Indeed, a separate part of the INA, 8 U.S.C. 1202(a), speaks directly to consular venue. Under Section 1202(a), the authority to determine where a visa application will be processed has been vested in the discretion of the Secretary of State. Section 1202(a) expressly provides that an alien "applying for an immigrant visa * * * shall make application therefor in such form and manner and at such place as shall be by regulations prescribed." Section 1202(a) does not, however, contain any prohibition against discrimination based on nationality similar to that in Section 1152(a). That omission is significant, for "[w]here Congress includes particular language in one section of a statute but omits it in another

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[31] Under Section 1152(a)(2), the total number of immigrant visas for any single foreign country may not exceed seven percent of the total number of immigrant visas based on family and employment preferences that are available during any fiscal year. 8 U.S.C. 1152(a)(2); see 8 U.S.C. 1153(a) and (b). That per-country limit is subject to an important qualification for spouses and children of lawful permanent resident aliens. See 8 U.S.C. 1152(a)(4). With certain exceptions, an applicant is assigned to the country of his or her birth for the purpose of applying the seven-percent limit. See 8 U.S.C. 1152(b).

* * * it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2040 (1993). Examination of the INA as a whole therefore demonstrates that Section 1152(a)(1) does not apply to consular venue. See *Beecham* v. *United States*, 114 S. Ct. 1669, 1671 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences[.]").

A construction of Section 1152(a)(1) as extending to consular venue determinations made under the distinct authority of Section 1202 would be unworkable. Under respondents' analysis, none of the factors listed in Section 1152(a)(1), including the alien's "place of residence," could be considered in establishing consular venue rules. Thus, if respondents' construction were adopted, the State Department could not require aliens to apply for visas in their place of residence. See 22 C.F.R. 42.61(a). But the State Department has historically required most aliens to apply for immigrant visas at their place of residence, for there has always been "profound concern that an alien not avoid meaningful examination * * * by having the visa application processed by a consular office in an area remote from his or her country of residence." 59 Fed. Reg. 39,954 (1994).

2. The court of appeals believed the plain language of Section 1152(a)(1) supported its conclusion (see Pet. App. 8a-9a), but that language will not bear the construction that the panel placed on it. Section 1152(a)(1) governs only the "issuance" of a visa. The common understanding of the term "issuance" plainly indicates that it is used in Section 1152(a)(1) to refer to the ultimate grant of a visa by a consular officer, not to every aspect of the process by which the State Department determines whether the visa should be granted or denied. It strains the meaning of

"issuance" of visa to suggest that the term includes all the procedures for processing an immigrant visa application.[32]

The placement of the anti-discrimination rule within Section 1152 strongly indicates that the court of appeals' construction is mistaken. Congress placed the prohibition in a section of the INA that addresses numerical limitations on visa issuance. Had Congress intended to enact a general bar against nationality-based distinctions in the exercise of all functions relating to decisions whether to admit or exclude aliens seeking to immigrate, it would have enacted such a bar as a general provision of the INA, rather than as a subpart of a subsection speaking to the implementation of the nationality-based numerical limitations for the issuance of immigrant visas.

The background of Section 1152(a)(1) is consistent with our construction. The anti-discrimination language was added to Section 1152 in 1965 (see Pub. L. No. 89-236, § 2, 79 Stat. 911) as part of Congress's abandonment of the old immigration system which employed national-origin quotas. Congress replaced the system of numerical limitations for immigration from particular countries with a system of uniform per-country percentage limits that provides (subject to certain exceptions) for "issuance of immigrant visas without regard to national origin." See H.R. Rep. No. 745, 89th Cong., 1st Sess. 19 (1965); *id.* at 9, 10-13, 17; see also S. Rep. No. 748, 89th Cong., 1st Sess. 12-13, 21-22 (1965). Accordingly, Section 1152 addresses the

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[32] A leading dictionary defines "issue" to mean "officially putting forth, or getting out or printing * * * or making available or distributing * * * *or giving out or granting (as licenses)* or proclaiming or promulgating (as a written order or directive)." *Webster's Third New International Dictionary* 1201 (def. 9(a)(1)) (1986) (emphasis added). See also *Black's Law Dictionary* 830 (6th ed. 1990) (similarly defining "issue" to mean "[t]o send forth; to emit; to promulgate; as an officer issues orders").

subject of relative "preference" or "priority" (and reciprocal disadvantage or "discrimination") in the allocation of immigrant visas by making clear that the uniform percentage limit applicable to immigration from each country is the only limit that may be placed on the number of immigrant visas that may be granted to nationals of any country. Nothing in the background of Section 1152(a)(1) suggests that Congress intended it to have a broader reach.

Nationality distinctions have long played a significant and legitimate role in the application of our immigration laws, and they continue to play such a role.[33] Indeed, even though Congress has generally prohibited consular officers from discriminating in individual visa decisions on the basis of nationality, Congress itself has enacted into law several special nationality-based immigration preferences, reflecting foreign policy concerns of the United States.[34] In exercising "the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests" (*Fiallo*, 430 U.S. at 795 n.6), Congress has simply not prohibited the State Department from establishing consular venue rules based on the nationality of the aliens seeking admission to the United States.

3. Finally, while we believe that the meaning of "issuance" in this context is plain, if there is some

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[33] See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Matthews* v. *Diaz*, 426 U.S. 67, 78-80 (1976); see also *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding registration requirements for Iranian students), cert. denied, 446 U.S. 957 (1980); 8 C.F.R. 212.1 (nationality-based visa and passport requirements for nonimmigrants).

[34] See, *e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 103, 104 Stat. 4985 (setting aside visas for natives of Hong Kong); § 134, 104 Stat. 5001 (special visas for Tibetans); Soviet Scientists Immigration Act of 1992, Pub. L. No. 102-509, 106 Stat. 3316 (special admission rules for scientists from the former Soviet Union).

ambiguity in that term, the court of appeals should have deferred to the State Department's reasonable construction of it, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). State Department officials are responsible for carrying out the functions of processing visa applications and issuing visas. Since Congress certainly did not express "a specific intention" (*id.* at 845) that Section 1152(a)(1) should apply to consular venue rules, the State Department was responsible for making the determination as to the scope of that Section. "In such a case, a court may not substitute its own construction of [the] statutory provisions for a reasonable interpretation made by the administrator of [the] agency." 467 U.S. at 844.[35]

B. The Consular Venue Policy Challenged In This Case Does Not Discriminate On the Basis of Nationality

Even if we assume that the anti-discrimination rule of Section 1152(a)(1) applies to consular venue rules, it is nonetheless the case that the rule challenged in this case does not violate it.

In the first place, as Judge Randolph noted (Pet. App. 15a), "it is not nationality that precludes visa processing" in Hong Kong. The distinction drawn by the State Department's policy is not between Vietnamese and other nationals, but between migrants in Hong Kong and other countries who have been screened out under the CPA, and all other persons, regardless of their nationality. A Vietnamese national who resides legally in Hong Kong (for example, a Vietnamese businessman who is living there

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[35] Under 8 U.S.C. 1103, the Attorney General may issue a controlling determination with respect to questions of law that arise in the administration of the INA, even with respect to functions administered by State Department officials, but she has not done so with respect to Section 1152(a)(1).

for an extended period)—and indeed a Vietnamese national other than a screened-out migrant who resides in Hong Kong illegally—may submit an immigrant visa application to be processed by the Consulate General in Hong Kong.[36] The same is true of a Vietnamese national who has been "screened-in" under the CPA screening process and has therefore been determined to be potentially eligible for refugee status.

Respondents do not contest that the CPA itself is a valid international undertaking on the part of the United States and other interested countries. The consular venue rule that respondents challenge is tied directly to the CPA and to the categories of aliens affected by it, and it therefore cannot be thought to violate the non-discrimination provision of Section 1152(a)(1). Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 76-79 (1981); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 175-181 (1979).

Respondents have argued, however, that the policy nonetheless discriminates on the basis of nationality because (they contend), even among aliens illegally present in first-asylum countries, it is only Vietnamese nationals who must return to their home country to apply for immigrant visas. As a factual matter, that contention is misleading; the CPA was adopted to address a broader problem than that of Vietnamese migrants, including Laotian migrants, and its imperative of repatriation of screened-out migrants is not limited to Vietnamese nationals. See J.A. 40, 185, 193-194.[37]

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[36] Absent directives to the contrary, the State Department's consular venue regulation permits an alien to apply for an immigrant visa "at the consular district having jurisdiction over the alien's place of residence." 22 C.F.R. 42.61(a).

[37] We pointed out in the *Lisa Le case* that the policy against processing visa applications in Hong Kong from screened-out migrants applies also to Laotian migrants. Consular officials in Hong Kong were not aware of any screened-out Laotian migrants in Hong Kong who had sought to apply for immigrant visas to the United States, however. Leininger Aff. ¶ 16 (June 14, 1995) (lodged with the Clerk of this Court). The majority of Laotian migrants are in Thailand, and the United States embassy in Thailand advises screened-out migrants there to return to Laos and apply for immigrant visas in Vientiane, Laos. Sykes Aff. ¶ 4 (June 15, 1995) (lodged with the Clerk). See also Hancock Aff. ¶ 6 (June 14, 1995) (lodged with the Clerk).

Even if we put that factual point aside, the more fundamental flaw with respondents' argument is that there are no other nationals in Hong Kong who are similarly situated to the screened-out Vietnamese but are treated differently. The CPA is a unique, but precedent-setting, arrangement established to resolve claims to refugee status amidst a mass migration crisis. Nowhere else is there such a screening process in place. In conjunction with the other signatories to the CPA (and in response to their objections), the State Department adopted the policy against processing screened-out migrants' immigrant visa applications to address a particular problem in a particular place.

The policy at issue here reflects no animus against Vietnamese nationals; to the contrary, Vietnamese nationals have been among the greatest beneficiaries of United States immigrant visas in recent years. See Pet. 19. The policy that respondents challenge instead is tailored to address a very specific problem involving migration of nationals primarily of one country, without precise parallel elsewhere. The policy could, of course, be adapted for future migration crises, but even in those situations, the crises would quite likely involve nationals of only one country, or a few countries.

The question then is whether the State Department is prohibited from adopting consular venue rules affecting nationals of a particular country precisely *because* inter-

nal conditions in that country have created a migration crisis. We submit that the answer must be no. These are situations where the State Department may conclude that nationals of a particular country constitute "a legitimate class of one." Cf. *Nixon* v. *Administrator of General Servs.*, 433 U.S. 425, 472 (1977). A contrary holding would deprive the United States of an effective tool in deterring massive migration, a situation that creates extraordinary dangers to human life. It would also hobble the State Department in its effort to induce voluntary repatriation of migrants who are not refugees—and contrary to respondents' submission, it could well perpetuate, rather than alleviate, the anxiety and instability created by the extended stay of migrants in countries of first asylum, whose patience with the presence of those migrants may wear thin.

Finally, there has been absolutely no showing in this case that the challenged consular venue policy has any discriminatory *effect* on the "issuance" of immigrant visas, which is, after all, the subject directly addressed by Section 1152(a)(1). See p. 47, *supra*. Thus, a necessary premise of respondents' discrimination claim—that the Department's policy adversely affects the issuance of immigrant visas to Vietnamese nationals—is absent, and the discrimination claim cannot be sustained under any theory.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MICHAEL JAY SINGER
ROBERT M. LOEB
Attorneys

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